

December 1972

Constitutional Law--Martial Law--Preserving Order in the State: A Traditional Reappraisal

James E. Roark

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

James E. Roark, *Constitutional Law--Martial Law--Preserving Order in the State: A Traditional Reappraisal*, 75 W. Va. L. Rev. (1972).

Available at: <https://researchrepository.wvu.edu/wvlr/vol75/iss2/7>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

STUDENT NOTES

Constitutional Law — Martial Law — Preserving Order in the State: A Traditional Reappraisal

I. INTRODUCTION

In recent years Americans have witnessed numerous human phenomena variously described as “riots”, “protests”, “insurrections”, “demonstrations” and, in general, “disorders.”¹ The dialogue generated by these incidents has been lengthy and heated; scholarly comment² has been abundant. Lawmakers at the federal, state and municipal levels have hastened to take decisive action that would prevent reoccurrences of such disintegration in societal law and order.³

One complicating factor in discussing disorders is the various ways in which they occur. Some have been violent,⁴ and others have

¹ Detailed accounts of riotous activities and other disorders up to and including the summer of 1967 are compiled and analyzed in REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter cited as CIVIL DISORDERS]. Disturbances and disorders at colleges and universities are enumerated and discussed in THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970) [hereinafter cited as CAMPUS UNREST].

² E.g., Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971); Murray, *Civil Disturbances, Justifiable Homicide and Military Law*, 54 MIL. L. REV. 129 (1971); Mutter, *Some Observations on Military Involvement in Domestic Disorders*, 29 FED. B.J. 59 (1968); Waranoff, *Federal Judicial Control of the National Guard*, 52 B.U.L. REV. 1 (1972); Weiner, *Martial Law Today*, 55 A.B.A.J. 723 (1969); Comment, *Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations*, 59 KY. L.J. 547 (1970) [hereinafter cited as *Proclaim Martial Law*]; Comment, *Constitutional and Statutory Bases of Governor's Emergency Powers*, 64 MICH. L. REV. 290 (1965) [hereinafter cited as *Governor's Emergency Powers*]; Comment, *Martial Law*, 42 S. CAL. L. REV. 546 (1969) [hereinafter cited as *Martial Law*].

³ The President's Commission that investigated civil disorders in the aftermath of the summer of 1967 strongly urged state governments to reevaluate and revise state laws concerning control of civil disturbances. CIVIL DISORDERS, *supra* note 1, at 288-91. The West Virginia Legislature subsequently amended the West Virginia Riot Control Law in 1969. W. VA. CODE ch. 61, art. 6 §§ 1-5 (Michie Supp. 1972), amending W. VA. CODE ch. 61, art. 6 §§ 1-5 (Michie 1966). For a discussion of this law see Comment, *Criminal Law — West Virginia Riot Law*, 72 W. VA. L. REV. 99 (1970). Congress also revised the Civil Disorders Riot Provisions of the Federal Criminal Code in 1968. 18 U.S.C. §§ 231-32, 2101-02 (1970). The constitutionality of the amended provisions was upheld in *National Mobilization Comm'n v. Foran*, 411 F.2d 934 (7th Cir. 1969).

⁴ Violence occurred in Newark and Plainfield, New Jersey. N.Y. Times, July 20, 1967, at 1, col. 8 (city ed.); CIVIL DISORDERS, *supra* note 1, at 30-46. Disorder also erupted in Detroit, Michigan, CIVIL DISORDERS *supra* note 1, at 47-61.

been nonviolent.⁵ Some have been random, unplanned and sporadically unpredictable,⁶ while others have evidenced considerable prior planning and detailed strategy on the part of the actors.⁷ Some have been ephemeral, isolated and readily confined to a small area;⁸ others have encompassed larger territory for extended periods of time.⁹ In each instance, however, the disorder has been met by some degree of discretionary governmental action in the executive branch.¹⁰ Executive action has, to some extent, involved force.¹¹ In large scale disorders, the peacekeeping forces of several governmental units have been employed to maintain or restore the peace.¹² Overall, governmental reactions have varied from utilizing all available local police to the more serious response of augmenting the local authorities with state and federal military forces.¹³ The trend is clearly toward increased governmental recourse to military force, resulting in frequent confrontation between citizens and the National Guard.¹⁴

⁵ Essentially non-violent student demonstrations occurred in Illinois, Maryland, New Mexico, Wisconsin, Ohio and Kentucky in the aftermath of the invasion of Cambodia by U.S. military forces. See *NEWSWEEK*, May 18, 1970, at 28-30. In these six states, the Governors instituted martial law to quell student disorders. For a detailed account of the institution of martial law at the University of Kentucky see *Proclaim Martial Law*, *supra* note 2.

⁶ The Advisory Commission on Civil Disorders observed, "they [riots] are unusual, irregular, complex, and, in the present state of knowledge, unpredictable social processes. Like many human events, they do not unfold in orderly sequences." *CIVIL DISORDERS*, *supra* note 1, at 63. The Commission concluded that, "[o]n the basis of all the information collected, . . . the urban disorders of the summer of 1967 were not caused by, nor were they the consequence of, any organized plan or 'conspiracy.'" *Id.* at 89.

⁷ The May Day demonstrations in Washington, D.C., in 1971, evidenced considerable prior planning in the designation of key points within the city to disrupt traffic flow. *N.Y. Times*, May 5, 1971, at 26, col. 3 (city ed.). Contrary to the conclusions reached by the Advisory Commission on Civil Disorders, the House of Representative's Un-American Activities Committee (subsequently renamed the Internal Security Committee) defined the riot situations of 1967 as planned "civil revolts," insurrectionary in scope and a preliminary phase of "guerrilla warfare," organized and planned by black militants in collaboration with domestic and foreign Communist groups. *HOUSE COMM. ON UN-AMERICAN ACTIVITIES, GUERRILLA WARFARE ADVOCATES IN THE UNITED STATES*, H.R. REP. NO. 1351, 90th Cong., 2d Sess. 57-61 (1968). See also *CIVIL DISORDERS*, *supra* note 1.

⁸ Generally speaking, campus demonstrations during the spring of 1971 were confined to small areas. *CAMPUS UNREST*, *supra* note 1, at 3.

⁹ The Advisory Commission listed eight disorders as "major." These were characterized by fires, looting, reports of sniping, and violence lasting more than two days, as well as the use of National Guard or Federal forces in addition to other local authorities. These included disorders at Buffalo, N.Y.; Cincinnati, Ohio; Detroit, Mich.; Milwaukee, Wis.; Minneapolis, Minn.; Newark and Plainfield, N.J.; and Tampa, Fla. *CIVIL DISORDERS*, *supra* note 1, at 65.

¹⁰ *CIVIL DISORDERS*, *supra* note 1, at 71-72.

¹¹ *Id.* at 171-81, 267-91.

¹² *Id.*

¹³ *Id.*

¹⁴ From the end of World War II through February, 1968, the National

The purpose of this note is to examine the sources, scope, and limits inherent in the exercise of discretionary executive authority to preserve or restore domestic order in the face of insurrections or riots. Underlying the political debate on the proper role of the executive in preserving domestic order, is the fundamental query: What is the proper balance to be struck between the constitutionally guaranteed rights of the individual and the right of the state to take action necessary to effectuate and maintain its existence? The increased reliance on state and federal military force to preserve domestic tranquility underlines serious constitutional questions. Generally, the use of military force has been justified as a proper exercise of the executive authority to proclaim martial law.¹⁵ Additional questions are presented because there is considerable confusion surrounding martial law; historically, the term has been used to refer to a myriad of diverse occasions. "Martial law", in its most comprehensive sense, refers to law that is promulgated and administered by military authorities and agencies to preserve public order, protect persons, and defend property in areas wherein civil government is unable to function.¹⁶

The use of the military in times of domestic crisis is a common technique of state government.¹⁷ The military forces of West Virginia have been called out for state duty numerous times in this century; martial law has been declared twice.¹⁸ Essentially, this note will focus on the constitutional and statutory power available to the Governor

Guard was summoned to supplement local police authorities in controlling domestic disturbances approximately one hundred times in thirty-three States. Eighteen of these occurred from June through August, 1967. *Id.*, at 274. From January, 1968, to May, 1970, the National Guard was employed on 324 separate occasions to quell varying degrees of civil disorders. 116 CONG. REC. 27,339 (daily ed. May 4, 1970); CAMPUS UNREST, *supra* note 2, at 174.

¹⁵ *Martial Law*, *supra* note 2, at 547-49.

¹⁶ C. FAIRMAN, *THE LAW OF MARTIAL RULE* 43 (1930) [hereinafter cited as FAIRMAN].

¹⁷ Note 14, *supra*. See FAIRMAN, *supra* note 16, at 67-90, 138-62; R. RANKIN, *WHEN CIVIL LAW FAILS* 65-173 (1939) [hereinafter cited as RANKIN].

¹⁸ Martial law was first invoked to deal with the Paint Creek-Cabin Creek strike situation in West Virginia during 1912 and 1913. C. AMBLER and F. SUMMERS, *WEST VIRGINIA—THE MOUNTAIN STATE* 448-52 (2d ed. 1958). The second instance in which martial law was proclaimed occurred during a period of labor violence in Mingo County in 1921 and 1922. *Id.* at 454-60. Of the first instance, it has been said: "In the history of the United States, martial law has never been used on so broad a scale, in so drastic a manner, nor upon such sweeping principles as in West Virginia in 1912-13 during the Paint Creek trouble. . . [it was an example of] absolute martial law with all its force." RANKIN, *supra* note 17, at 85. See also Ballantine, *Military Dictatorship in California and West Virginia*, 1 CALIF. L. REV. 413 (1913). For historical and political commentary see Lynch, *The West Virginia Coal Strike*, 29 POL. SCI. Q. 626 (1914).

of West Virginia to call forth the National Guard to implement martial law and emergency measures short of martial law.

II. INITIAL CONSIDERATIONS: WEST VIRGINIA CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The West Virginia Constitution

The West Virginia constitution is similar to those of most states that have not undertaken revision since the late nineteenth century.¹⁹ The constitution directs the Governor to insure that the laws are faithfully executed.²⁰ Additionally, the chief executive is designated as commander-in-chief of the military forces of the state and, consequently, authorized to "call out the same [militia] to execute the laws, suppress insurrection and repel invasion."²¹

Martial law is not defined or specifically mentioned in the constitution. In one important provision, however, martial law is recognized by implication: "[N]o citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State."²² Under martial law, military forces perform the functions of civil government, including replacement of the civil courts by military tribunals. This constitutional admonition implies that under no circumstances can a citizen be tried by the military for a crime over which a functioning civilian tribunal has jurisdiction.

The constitution also declares that "[t]he provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."²³ The import of this section is clear; regardless of extraneous events, no provision of either the federal or the state constitution may

¹⁹ *Governor's Emergency Powers*, *supra* note 2.

²⁰ W. VA. CONST. art. VII, § 5.

²¹ W. VA. CONST. art. VII, § 12. Thirty-five state constitutions explicitly confer this authority on the Governor. The constitutions of the remaining fifteen states do not. One of the fifteen, Tennessee, specifically forbids the use of such power by the Governor, stating that the use of the military is "[f]orbidden . . . except in case of rebellion or invasion and then only when the legislature shall declare by law, that the public safety requires it." TENN. CONST. art. III, § 5. See, *Governor's Emergency Power*, *supra* note 2, at 290-93.

²² W. VA. CONST. art. III, § 12.

²³ W. VA. CONST. art. I, § 3.

be disregarded. Due process is afforded constitutional protection.²⁴ Interestingly, the West Virginia constitution, in contrast with the United States Constitution, dictates that the "privilege of the writ of habeas corpus shall not be suspended."²⁵ The language is unequivocal; there is nothing left to discretionary interpretation. No branch of state government has the lawful authority to suspend the writ of habeas corpus.²⁶ Finally, the constitution commands that "[t]he military shall be subordinate to the civil power"²⁷

B. West Virginia Statutory Provisions

The constitutional limitations on the Governor's power to act in maintaining or restoring order have received scant legislative recognition. The same cannot be said of those constitutional provisions directing the executive to faithfully execute the laws of the state, or recognizing the Governor as the commanding officer of the state's military forces. The Governor is granted nearly unbridled discretion to apprehend and imprison persons at war with the United States or West Virginia.²⁸ The expansive nature of executive authority is evidenced by the statute empowering the Governor to

cause to be apprehended and imprisoned all who in time of war, insurrection or *public danger* shall willfully give aid, support or information to the enemy or insurgents, or *who, he shall have just cause to believe*, are conspiring or combining together to aid or support any hostile action against the United States or this State.²⁹

Most striking is the failure of the legislature to define "public danger" or set forth any standards to guide the Governor in formulating "beliefs" regarding "conspiracies" against the state. It is of more than passing importance to ponder how the state, without any initial action

²⁴ W. VA. CONST. art. III, § 10.

²⁵ W. VA. CONST. art. III, § 4. The United States Constitution provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

²⁶ The expanded scope of habeas corpus relief in federal courts renders state action under the state constitution largely irrelevant. Even if the executive or legislature of a state were to suspend the state writ of habeas corpus, there would still be recourse to the federal courts. See *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

²⁷ W. VA. CONST. art. III, § 12. With the lone exception of New York, a similarly worded provision is found in all state constitutions. *Governor's Emergency Powers*, *supra* note 2, at 294.

²⁸ W. VA. CODE ch. 5, art. 1, §§ 1-3 (Michie 1966).

²⁹ *Id.* at § 2 (emphasis added).

by the federal government, may be at war, since the constitutional prerogative of declaring war is within the power of Congress.³⁰ In any case, little clarification of the extent of the Governor's power is afforded by analysis of statutes implementing the constitutional grants of executive power.³¹ "In event of war, insurrection, rebellion, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony," or where there is imminent danger that such events might occur, the Governor has the authority to call on the National Guard to perform whatever duties he may consider necessary.³² At the occurrence of a public disaster or emergency, there is executive authority to declare a limited emergency in the area affected and to delegate such authority as the Governor deems necessary and expedient to the National Guard commander.³³ In such instances, the National Guard is directed to "coordinate and direct" the activities of all persons in the affected area, including organizations engaging in relief or evacuation activities.³⁴

³⁰ Action by the state executive, claiming justification under the Governor's "war powers," clearly presents a federal question. While it may be surprising to discuss "war powers" of the Governor, "since 1912 West Virginia has had four 'wars' by proclamation of the governor, and war powers were successfully claimed in Montana, Nebraska and Texas." FAIRMAN, *supra* note 16, at 103. However, the United States Constitution states "[n]o State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. art. I, § 10.

Reference to the Articles of Confederation, to drafts of the Constitution, and to early acts of Congress, lead to the conclusion that the true intent of the constitutional prohibition is that a state may not wage war except in the two instances cited. By "invasion," the danger most immediately considered was an "Indian invasion." FAIRMAN, *supra* note 16, at 104. It seems clear that the states are denied the power to declare war. Therefore, a Governor's authority to "rule" by martial law is not derived from his "war powers." FAIRMAN, *supra* note 16, at 100-05. See *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883).

³¹ W. VA. CODE ch. 15, art. 1D, §§ 1-5, 14 (Michie 1966).

³² W. VA. CODE ch. 15, art. 1D, § 1 (Michie 1966). A major difficulty with these statutory provisions is the lack of any statutory or judicial definitions. For example, in the absence of legislative clarification, "insurrection," "tumult," "riot," and "mob" are left to long-existing common law definition. There is authority to support the proposition that any direct violence against the government is insurrectionary. See, *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). One case requires that the violence occur with the intent to overthrow the government. *Home Insurance Co. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954).

In West Virginia, a "riot" is defined by reference to the common law. Generally, a "riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel . . ." *State v. Woolbridge*, 129 W. Va. 448, 470, 40 S.E.2d 899, 911 (1946).

³³ W. VA. CODE ch. 15, art. 1D, § 2 (Michie 1966). This statute specifically provides that "[n]othing contained in this section shall be construed to limit or deny the authority of the governor to declare martial law."

³⁴ These statutory provisions fail to provide guidelines for coordinating the activities of the National Guard with local authorities. Nor are there statutory provisions stating what the Governor may specifically order the mobilized

In case of "invasion, insurrection, rebellion or riot, flood or other public disorder or emergency," the Governor is granted the discretionary authority to proclaim martial law, and such a proclamation may include such powers as the Governor, in his discretion, determines necessary to "meet the exigencies of the situation."³⁵ Martial law may be declared in any "towns, cities, districts or counties" where the disorder exists.³⁶

These statutory provisions raise constitutional questions of considerable magnitude. The specific problem is whether the provisions are consistent with the constitutional prohibition against the trial of citizens in military courts for offenses cognizable by the civil courts. In addition, it must be determined whether these statutory powers can be squared with the constitutional mandate that both the state and federal constitutions are always operative in time of war and peace, and that the "plea of necessity, or any other plea" cannot be involved as justification for its violation. As a corollary, there must be a determination whether an "exigency of the situation" is equivalent to a "plea of necessity." Perhaps, in light of the trend sanctioning increased reliance on the discretionary authority of the governor to maintain and insure domestic order,³⁷ West Virginia's constitutional prohibitions are simply carry-overs from some distant past. Since the West Virginia

troops to do. Likewise, there is no legislative specification of the Guard's role, vis-à-vis other law enforcement agencies, particularly local police authorities.

³⁵ W. VA. CODE ch. 15, art. 1D, § 14 (Michie 1966). This power, as indicated, is statutory. Its existence can only be implied from the West Virginia constitution. See W. VA. CONST. art. III, § 12. Only Alaska and Rhode Island specifically confer constitutional authority upon the Governor to declare martial law. ALAS. CONST. art. III, § 20; R.I. CONST. art. I, § 18.

³⁶ In West Virginia, the circuit courts exercise jurisdiction over at least one county. See W. VA. CONST. art. VIII, §§ 1, 10-13. Unless the civil courts are unable to function, it is questionable whether the Governor has the authority to declare martial law in a town or district, except in instances when the circuit court is located therein. However, such a result has been upheld. *Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914); *In re Jones*, 71 W. Va. 567, 77 S.E. 1029 (1913); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912).

A different result was reached in New Castle, Indiana, in 1955, during a labor dispute. The Governor proclaimed a state of emergency and designated the city and county, which was the focus of the violence, a military district, thereby establishing martial law. The circuit court judge of the county immediately abdicated his bench, refused to hold court, and contended that neither he nor the court had any legal status under a declaration of martial law. The judge grounded his action on the proposition that, if the Governor's action was legal the court could no longer exist and, furthermore, the court could not exist under the Indiana constitutional provision which commanded that the military shall be kept in strict subordination to the civil power; moreover, the court could not be reincarnated by executive order or sufferance of the military. *IND. CONST. art. I, § 33. See, Note, Rule By Martial Law in Indiana: The Scope of Executive Power*, 31 *IND. L.J.* 456, 460 n.23 (1956).

³⁷ See note 14, *supra*.

constitution and its corresponding statutes fail to define "martial law" or the circumstances necessary for its institution, clarification must lie elsewhere. Neither the United States Constitution nor the federal statutes, define "martial law."³⁸ The definitions enunciated by state and federal courts compound this confusion.³⁹ Consequently, as a precedent for understanding the intricacies of martial law, it is essential to start at the beginning—Olde English Common Law.⁴⁰

III. MARTIAL LAW HISTORICALLY CONSIDERED

A. Olde English Common Law

Various systems of law coexisted in medieval England. In addition to common law and equity there existed the canon law, admiralty law, and marshall law. "Each of these rival jurisdictions had its own court or courts."⁴¹ As early as 1181, Henry II created a standing force of citizen-soldiers to supplement the regular feudal army. This was called the *jurata ad arma* and was the forerunner of today's local militia or National Guard.⁴² Initially, supervision of the "regular" feudal army was the prerogative of the Earl Marshall of England; the *jurata ad arma* was directed by the King's Constable.⁴³ By the mid-fourteenth century, these separate jurisdictions were combined to form the Court of Constable and Marshall. As an independent tribunal, it exercised exclusive jurisdiction over the discipline of the armed forces of Britain, both the civilian and regular armies, whenever they were led off to war.⁴⁴ The *jurata ad arma* were also used for domestic purposes. When so used, they were legally considered to be aides of the sheriff and subject to the ordinary courts, governed by the devel-

³⁸ See generally Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 A.B.A.J. 168-70 (1968); Comment, *Executive Power and Due Process: Demonstration, Riot and Insurrection*, 6 HOUST. L. REV. 882, 894-902 (1969).

³⁹ RANKIN, *supra* note 17, at 173-205; FAIRMAN, *supra* note 16, at 239-44. Even in West Virginia the judicial pronouncements are inconsistent. Compare *Ex parte Lavinder*, 88 W. Va. 713, 108 S.E. 428 (1921), with *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912).

⁴⁰ U. Colo. L. Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders With Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399, 421-430 (1972) [hereinafter cited as *Study*].

⁴¹ FAIRMAN, *supra* note 16, at 2.

⁴² In its capacity as citizen-soldiers, the *jurata ad arma* later came to be known as the *posse comitatus*, a term more familiar to American jurisprudence. Engdahl, *supra* note 2, at 5.

⁴³ *Id.*

⁴⁴ *Id.*

oping precepts of the maturing common law.⁴⁵ Only when used in time of actual war, was this citizen force subject to the Marshall's law.⁴⁶

The fifteenth century witnessed a novel jurisprudence called the Law of Star Chamber; the Marshall's law was used effectively to eclipse the tenets of due process of law.⁴⁷ As a result of this abuse of the citizenry by military force, the Restoration government declared that the *jurata ad arma*, which had become known as the *posse comitatus*, was to be considered distinct from the militia. The militia could only be used in time of actual war, insurrection, rebellion, or invasion.⁴⁸ As a result, the Bill of Rights of 1689 unequivocally declared that the Crown had *no power* to use the *posse* against English citizens.⁴⁹

Consistent with the principles of due process and ordinary civilian law, the Riot Act of 1714 was enacted.⁵⁰ Suppression of riots and apprehension of offenders were to be effected by ordinary local officers, such as the mayor and sheriff, assisted as needed by the *posse*.⁵¹ Those arrested were tried by the ordinary courts. Additionally, Parliament affirmed use of the militia, in times of "insurrection," "rebellion" and "invasion," but these situations were distinguished

⁴⁵ *Id.*

⁴⁶ It is Engdahl's conclusion that pre-fourteenth century precedents established, as integral to the concept of due process, the principle that expedient recourse to force, appropriate in war, has no place in civilian situations, unless the courts cannot function. "A line was drawn between war and civil disturbances, and between sheer force and due process of law . . . which would tolerate no infringement by martial law." *Id.* at 7.

⁴⁷ F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 260-70 (1908).

⁴⁸ Civil officers and the *posse comitatus* were to be used to deal with domestic disturbances, but only in accordance with due process of law. Use of the military was reserved for actual warfare. Although historically the *posse* and the militia were one and the same, henceforth they were viewed differently and as separate entities.

⁴⁹ Engdahl, *supra* note 2, at 16. Never in time of peace, so long as the ordinary civil courts were functioning, was the government to resort to the armed forces to quell domestic turbulence; accordingly, it could not take recourse to martial law.

⁵⁰ *Id.* Essentially, this Act provided that in the event of a riot, the mayor, sheriff, or other civil magistrate should proceed to the scene of the disturbance and read aloud a proclamation to the crowd, ordering them to disperse. Rioters who remained were guilty of a felony and subject to punishment by the ordinary courts of the common law.

⁵¹ *Criminal Law—West Virginia Riot Law*, *supra* note 3, at 100. The West Virginia Riot Act, as amended, is a product of three principal sources: the English Common Law, the English Riot Law of 1714, and the Virginia Riot Law of 1848. Most states' riot laws are substantially patterned after the English act of 1714.

from mere "unlawful, riotous and tumultuous assemblies."⁵² Only while engaged in actual service were members of the militia subject to martial law, then consisting of the military law governing regular armed forces.⁵³ More importantly, the postulates applicable to the citizens-soldiers, the *posse*, remained the same; the *posse* should not be subject to any law other than ordinary civilian standards of due process of law.

B. From American Colonial Development and the Revolutionary War to the Civil War

By the eighteenth century, new colonial charters reflected the Petition of Right, the Bill of Rights, and the Riot Act.⁵⁴ The colonies were all but precluded from martial law to deal with domestic disorders of lesser gravity than open armed rebellion, tantamount to civil war. Furthermore, martial law was to be avoided even under circumstances of insurrection or rebellion, unless "necessity" required it. "Necessity" meant that the civil government no longer functioned and military force was essential for the survival of the colonies.⁵⁵

The American Revolutionary War was the eventual result of England's disregard for these basic tenets of English law. But, the principles of due process, subordination of the military, and, restrictions on the use of martial law were to be clearly remembered when the framers of the Constitution met in Philadelphia.

At the Constitutional Convention in Philadelphia, the delegates addressed themselves to the problems of dealing with domestic violence. After extended discussion, the committee of the whole presented to the Convention a recommended clause aimed at resolving this problem.⁵⁶ This proposal called for the federal government to secure

⁵² Engdahl, *supra* note 2, at 17.

⁵³ 1 W. BLACKSTONE, COMMENTARIES 441-45.

⁵⁴ Engdahl, *supra* note 2, at 22-31.

⁵⁵ The Boston Massacre is a clear example of the misuse of this principle. To most of the colonists, their status as Englishmen was of primary importance during the period preceding the Revolutionary War. They considered themselves to be faithful to the Crown. This attitude underlined the gravity of the Boston Massacre because English soldiers had murdered English civilians in time of peace. Engdahl, *supra* note 2, at 22-31.

⁵⁶ There were several recommendations as to how the power of the Republic should be used to insure domestic peace. Some of the delegates favored leaving the states to defend themselves. Others thought the national government should have the power to quell insurrection without any need for a specific declaration to that effect. Edmund Randolph of Virginia proposed the "guaranty clause" to the Convention and declared it to have two purposes: firstly, to secure Republican Government and secondly, to suppress domestic commotions. Engdahl, *supra* note 2, at 35-42.

republican government for the states, and was embodied as the "guaranty clause" in the Constitution. It provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.⁵⁷

In light of this provision, it has been asserted that any state is precluded from declaring martial law, even in the face of necessity.⁵⁸ It is contended that since the federal government is obligated to secure republican government for each state, questions relating to the necessity of utilizing military force to secure a state from invasion, war, and domestic violence are purely federal questions that should be decided by federal authorities.⁵⁹

It was also necessary to assure the populace that the military

⁵⁷ U.S. CONST. art. IV, § 4.

⁵⁸ Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1266 (1942). Fairman reasons:

Whatever the law of the state may be, every exercise of martial rule by state officers presents at least potentially a federal question. Where the governor has declared or has acted upon the view that a condition of war exists, the question arises how a state can constitutionally wage war in the face of Article I, Section 10, Clause 3 The theory of the Constitution seems to be that if matters came to such a pass [as provided in above cited provision] the remedy would be for the authorities of the state to invoke Article IV, Section 4, wherein the United States guarantees every state a republican form of government and protection against invasion and domestic violence.

Id.

In *State ex rel. Mays v. Brown*, the dissenting opinion stated: That guaranty speaks plainly Does the State for its preservation need methods so at variance with constitutional guaranties as is martial law when it may obtain the power of the Union to suppress even domestic violence? Can not the militia and the United States army pacify any section of the State, or the whole State, by methods strictly within the Constitution and laws? It was so believed when the Federal government was formed.

71 W. Va. 519, 533, 77 S.E. 243, 249 (1912) (Robinson, J.J., dissenting opinion).

⁵⁹ Fairman, *supra* note 58, at 1266. It has likewise been argued that since (1) only the Congress can suspend the writ of habeas corpus, the executive can never accomplish this; (2) the military power must at all times, even in invasion and insurrection be subordinate to the civil; a fortiori in suppression of lawlessness merely local; (3) in consonance with the foregoing, the military power of the state can only be used to aid the civil power. Since the writ cannot be suspended by the executive, then the executive cannot declare martial law because such action and suspension of the writ must accompany one another. Grant, *Suspension of the Habeas Corpus in Strikes*, 3 VA. L. REV. 249, 262 (1916). The logical extension of this argument again makes the institution of martial law a federal question. Since Congress must decide whether or not the writ is to be suspended, only Congress should logically have authority to invoke martial law.

would remain subordinate to the civil government.⁶⁰ Historical analysis of the ratifying process in the several states and the demand for a Bill of Rights support the position that the fifth amendment's due process clause implies subjection of the military to civil power.⁶¹

Using its militia power, the first Congress addressed itself to clarification of the federal government's power to suppress "invasions" or "insurrections" at the request of an affected state's chief executive.⁶² In the succeeding years until the Civil War, whenever regular military troops or portions of the militia were utilized, they were generally employed as part of the *posse comitatus*⁶³ (not as soldiers, but as civilian aids supplementing, but always subordinate to, regular civil officers in enforcing normal civil laws).⁶⁴ Only where civilian governments were undeniably engaged in a bona fide struggle for survival, were soldiers used as soldiers to restore the peace.⁶⁵ Only in such instances were soldiers subject to military law and discipline, and only then did the military function as the government. Martial law was the law of necessity.⁶⁶

⁶⁰ See THE FEDERALIST NOS. 8, 25, 26, 27, 29 (A. Hamilton); THE FEDERALIST NO. 43 (J. Madison).

⁶¹ Engdahl, *supra* note 2, at 40-43. Engdahl's conclusion is that the first Congress, in promulgating the Bill of Rights, was satisfied that the due process clause of the fifth amendment was an effective safeguard against potential military oppression. This concept of due process, briefly stated, is that an individual may not have criminal sanctions visited upon him by the government unless ordinary legal procedures are followed. The absence of ordinary legal procedures, occasioned by the destruction or temporary indisposition of the civil government, is a prerequisite to institution of martial law. See also FAIRMAN, *supra* note 16, at 29-50.

⁶² See Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638 (1968).

⁶³ Engdahl, *supra* note 2, at 31-35. This was similar to the doctrine promulgated by Lord Mansfield in 1780 in England to justify his use of soldiers against English citizens during the "Lord Gordon Riots." The doctrine was based on the ancient law and tradition that required every able man in the realm to serve in the *posse*. Thus, a member of the military could be called to aid a sheriff or magistrate, "not as soldiers, but as citizens." The distinguishing factor was that when called as a civil peace-keeping force, these individuals were subordinate and obedient to the civil authorities. See *Rex v. Pinney*, 5 Car. & P. 254, 172 Eng. 962 (1832).

⁶⁴ Engdahl, *supra* note 2, at 50.

⁶⁵ These instances were Shay's Rebellion in Massachusetts in 1786, the Whiskey Rebellion in Pennsylvania during 1794, and the Dorr Rebellion in Rhode Island in 1842. Even in Rhode Island, where there was an authentic armed rebellion, and the use of martial law was upheld, the Supreme Court held that the due process clause of reasonableness remained applicable. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 46 (1849).

⁶⁶ "Martial law is the law of military necessity in the actual presence of war." *United States v. Diekelman*, 92 U.S. 520, 526 (1875). RANKIN, *supra* note 17, at 173. However, the Supreme Court and numerous state courts clearly indicated that soldiers and militiamen were personally liable for official acts committed against civilians, in violation of civilian laws, even though done pursuant to military orders. See, e.g., *Wise v. Withers*, 7 U.S. (3 Cranch) 330

C. From the Civil War to the Present

On several occasions during the Civil War, Union soldiers were utilized in a manner that either disregarded or superseded the ordinary civil law.⁶⁷ The United States Supreme Court addressed itself to this situation in *Ex parte Milligan*.⁶⁸ Milligan, a civilian Indiana citizen was arrested, tried, and sentenced to death by a military commission established pursuant to a presidential proclamation of martial law.⁶⁹ At the time of his trial, civilian, state, and federal courts were fully functioning in Indiana. On Milligan's petition for a writ of habeas corpus, the court addressed itself to the question of whether martial law could be instituted before civil government had ceased to function.⁷⁰ In a split decision, Milligan was ordered released.⁷¹ The majority held that in the absence of necessity for martial law in Indiana, substitution of summary military proceedings for the procedure guaranteed in civilian courts could not be allowed.⁷² As to the necessity for imposing martial law, the Court observed that there were no hostile forces presently in

(1806); *Hyde v. Melvin*, 11 Johns. 424 (N.Y. 1814). *Contra*, *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903), holding that when the militia [National Guard] "are in active service for the suppression of disorder and violence, their rights and obligations must be judged by the standard of actual war." *Id.* at 174, 55 A. at 956.

⁶⁷ The Civil War brought about numerous occasions where resort was made to martial law, either by Presidential proclamation or by the action of field military commanders pursuant to delegation of such authority by the President. In September, 1862, Presidential proclamation made subject to martial law not only insurgents, but also aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal acts. R. WINTHROP, *MILITARY LAW AND PRECEDENTS* 823 (2d ed. 1920). General Fremont declared and established martial law in the city and county of St. Louis in 1861; martial law was variously declared in whole or parts of Kansas, Missouri, Tennessee, Pennsylvania, Maryland, and most occupied areas. *Id.* at 824-27. See also FAIRMAN, *supra* note 16, at 162-97; Fairman, *supra* note 58, at 1278-89.

⁶⁸ 71 U.S. (4 Wall.) 2 (1866). The *Milligan* decision has been widely commented upon. See FAIRMAN, *supra* note 16, at 138-44; RANKIN, *supra* note 17, at 53-64. The traditional military view of this decision is expressed in R. WINTHROP, *supra* note 67, at 817-18. Contemporary discussion can be found in Engdahl, *supra* note 2, at 54-56; *Study*, *supra* note 40, at 421-30.

⁶⁹ See note 67, *supra*. For general discussion of military commissions, i.e., "the tribunals of martial rule" see FAIRMAN, *supra* note 16, at 197-205; R. WINTHROP, *supra* note 67, at 831-46.

⁷⁰ 71 U.S. (4 Wall.) 2, 124-25 (1866).

⁷¹ *Id.* The Court agreed unanimously that Congress had not meant to subject political prisoners to trial by military commission, that there had been no clear necessity to justify the executive's assumption of powers beyond those conferred by Congress, and that Milligan was subject to the statute. Fairman, *supra* note 58, at 1285.

⁷² 71 U.S. (4 Wall.) 2, 123 (1866). The Court stated that the right to jury trial "is not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Id.* As to the guarantees of the Constitution, "Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*." *Id.* at 125.

Indiana. Furthermore, "[I]f once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."⁷³ The majority particularized the instances that might justify institution of martial law:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.⁷⁴

The majority decision was based on the general concept of due process and on several specific guarantees in the Bill of Rights.⁷⁵ The concurring justices would have permitted martial rule not only in time of war, but at other periods of "public danger."⁷⁶ They deemed the

⁷³ *Id.* at 126-27.

⁷⁴ *Id.* at 127. The requirement of actual "war" in *Milligan* and the dictum by Justice Taney in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), have served as the basis for some state courts to grant war powers to a governor. See note 30, *supra*.

⁷⁵ See note 72, *supra*. In sweeping terms, the Court declared:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

71 U.S. (4 Wall.) 2, 120-21. The thrust of *Milligan* is that martial law is not a special application of constitutional due process. Instead, it is a concept that has no meaning unless the legal limitations of due process are discarded, *i.e.*, the civil courts are closed. The simplest meaning of the fifth and fourteenth amendments is that the government may not place criminal-type sanctions upon an individual without first complying with ordinary legal procedures. See, *e.g.*, McLaughlin, *What Has The Supreme Court Taught?*, 72 W. VA. L. REV. 326, 381-94 (1970). Martial law means "the individual has no enforceable legal right to a definable area of freedom from government action; this protected area was the essence of due process to the *Milligan* Court." *Study, supra* note 40, at 423.

⁷⁶ 71 U.S. (4 Wall.) 2, 140-41. The concurring opinion reasoned that the Constitution allows for both military and civil government. Congress has plenary power to govern the military, and this was not affected by provisions of the Bill of Rights. Furthermore, Congress is authorized to raise and support armies and to declare war. Consequently, when the nation is at war, it is

ability of the civil courts to function in times of public danger not controlling against the institution of martial law since they "might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators."⁷⁷ Essentially, *Milligan* stands for two propositions: First, martial law is only justified in the absence of a functioning civil government; second, the necessity of imposing martial law is a judicially reviewable question. Another important consideration to modern analysis of *Milligan* involves application of the theory of "incorporating." The Bill of Rights selectively is incorporated into the fourteenth amendment, making the vigorous limitations imposed on the actions of military troops applicable to, and binding upon, current state actions.⁷⁸

Immediately following *Milligan*, lower courts adhered to the pre-civil war principles affirming the military's subordination to the civil government.⁷⁹ Extra-judicial concepts, however, were in the process of changing.⁸⁰ Executives and legislatures in both federal and state governments were reassessing traditional precepts.⁸¹ Specifically, military forces were increasingly used as "soldiers" and not as part

within the constitutional authority of Congress to designate in what districts such imminent public danger exists to justify military trials. "It was for Congress to determine the question of expediency." *Id.* See also FAIRMAN, *supra* note 16, at 142.

⁷⁷ 71 U.S. (4 Wall.) 2, 140-41 (1866). The dissenting opinion defined martial law:

[Martial law is] to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise . . . and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

Id. at 142.

⁷⁸ See *Study, supra* note 40, at 426.

⁷⁹ See, e.g., *Milligan v. Hovey*, 17 F. Cas. 380 (No. 9605) (C.C.D. Ind. 1871); *McCall v. McDowell*, 15 F. Cas. 1235 (No. 8673) (C.C.D. Cal. 1867); *In re Egan*, 8 F. Cas. 367 (No. 4303) (C.C.N.D. N.Y. 1866); *Johnson v. Jones*, 44 Ill. 142 (1867).

⁸⁰ See, e.g., *Ex parte Moore*, 64 N.C. 802 (1870). The Governor of North Carolina invoked martial law and apprehended and jailed a number of prisoners. The court's return of the writ of habeas corpus ordering the prisoners to be released was ignored by the Governor. See also, *Ex parte Kerr*, 64 N.C. 816 (1870); Engdahl, *supra* note 2, at 60-63.

⁸¹ In order to strengthen the authority of carpetbagger governments and provide the President with increased power to quell anti-Negro violence in the south, the Reconstruction Congress passed the Ku Klux Klan Act in 1871. 10 U.S.C. § 333 (1970). This Act was the basis for federal intervention in racial disturbances in the south where a state was unable, refused, or failed to protect constitutional rights.

of a posse, which is subordinate to civilian laws and governmental officials.⁸² Following the lead of Congress, state legislatures adopted this trend.⁸³ By the turn of the century, such concepts, in direct contravention to the precedents of centuries of Anglo-American law, were receiving vigorous approval by many courts.⁸⁴

The Supreme Court specifically condoned this trend in *Moyer v. Peabody*.⁸⁵ In *Moyer*, the Governor of Colorado had determined that an insurrection existed in the face of a violent labor strike, but had neither declared martial law nor suspended the writ of habeas corpus. Moyer was summarily arrested and imprisoned by order of the Governor. Upon his release from imprisonment, he commenced an action for damages against the officer who executed the order and the Governor who had approved it.⁸⁶ The Court stated that what is due process of law depends on the circumstances and held that "the Governor's declaration that a state of insurrection existed is conclusive of that fact."⁸⁷ It conceded that the executive has nearly total discretion in its exercise of emergency powers, both in declaring an emergency and deciding how it shall be met.⁸⁸ Heretofore, the existing standard

⁸² *Study*, *supra* note 40, at 410-12; *See also* Engdahl, *supra* note 2, at 62-65. Congress made sweeping changes in the Federal Posse Comitatus Act in 1878. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145. Federal marshalls and other federal officials were prohibited from using federal troops as a posse. This was a reaction to the over use of the military as soldiers, especially during the election of 1876. (It has been suggested, however, that Congress should merely have emphasized the posse's subordination to civil law and authorities.) *Study*, *supra* note 40, at 412. However, statutes authorizing the President to use federal troops remained unchanged. With the abolition of the military as part of the posse, the implication was that federal troops were to be employed in domestic disorders as "soldiers." *Id.*

⁸³ *Study*, *supra* note 40, at 412. For instance, where the militia had been used as part of the posse of the sheriff or at the call of local and county officials, these changes conferred upon the Governor the sole power to activate and use the militia. This power conferred and authorized use of the militia as an independent force. Engdahl, *supra* note 2, at 63. Consequently, the principle of subordination of the military to the civil power no longer implied that if the military was used to enforce civilian laws, the troops were subject to the control of the civilian authorities and held to the ordinary standards of due process of law. The only requirements were that the militia be under the command of the commander-in-chief, who was also the chief executive of the civilian regime. *Id.*

⁸⁴ *See, e.g., In re Moyer*, 35 Colo. 159, 85 P. 190 (1904); *In re Boyle*, 6 Idaho 609, 57 P. 706 (1899), *appeal dismissed sub. nom.* Boyle v. Sinclair, 178 U.S. 611 (1900); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903); *Chapin v. Ferry*, 3 Wash. 386, 28 P. 754 (1891).

⁸⁵ 212 U.S. 78 (1909).

⁸⁶ *Id.* at 84.

⁸⁷ *Id.* at 83. The Court indicated that the choice of what measures to take during an emergency was an exercise of political power by the Governor. As such, it was beyond review by the judiciary, so long as the Governor's choice and action was made in good faith. *Id.*

⁸⁸ *Id.* at 85. "*Moyer* is basically a case which legitimates the expediency

had limited the state's powers to meet emergencies to no more than was necessary under the circumstances.⁸⁹ *Moyer* substituted it with an undefined good-faith standard.⁹⁰ This standard, while destined to become the minority view, was followed by a number of states; it was used to justify the use of federal and state troops to quell domestic disturbances, most of which were the outgrowth of labor disputes.⁹¹

The *Moyer* standard of good faith was substantially modified by the Court in *Sterling v. Constantin*.⁹² Texas oil and gas producers had organized to produce oil in violation of state conservation statutes. The ordinary civil authorities could not compel them to stop. Pursuant to purported threats of violence, the Governor proclaimed a state of insurrection, imposed a state of martial law, and used the military to stop the oil production.⁹³ The oil producers sought a restraining order, and the Governor defended on the basis of *Moyer v. Peabody*. The Court modified the *Moyer* decision, calling for detailed scrutiny of governmental response to an emergency; it required a showing of "direct relation" between the actions taken and the goal of restoring order.⁹⁴ Furthermore, the Court held that the Governor's declaration of necessity is conclusive of that fact, but the measures employed are reviewable by the courts.⁹⁵ Generally, the Court has continued to follow the "direct relation" test.⁹⁶

of military force in enforcing the law in extreme situations; it relegates the rights of individuals in these situations to secondary importance." *Study, supra* note 40, at 426.

⁸⁹ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

⁹⁰ Consequently, *Moyer* is authority for the principle that it is not necessary to have a formal cessation of civil law before military forces can be used to quell disorder; nor is it necessary in order to deny civilians legal redress or subject them to the control of the military commander. *Study, supra* note 40, at 426-27.

⁹¹ See, e.g., *United States ex rel. Seymour v. Fisher*, 280 F. 208 (D. Neb. 1922); *United States ex rel. McMasters v. Wolters*, 268 F. 69 (S.D. Tex. 1920); *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935); *Rose Mfg. Co. v. Western Union*, 251 S.W. 337 (Tex. Civ. App. 1923); *Ex parte McDonald*, 49 Mont. 454, 143 P. 947 (1914).

⁹² 287 U.S. 378 (1932).

⁹³ *Id.* at 380-85.

⁹⁴ *Id.* at 400-01. However, *Sterling* should be read cautiously because contrary to the factual situation in the *Moyer* case, there was no violence or threat of violence at the time the Governor proclaimed martial law. Additionally, there was no bona fide emergency. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). In those cases the Court found a "direct relation" between the emergency that existed and the measures taken by the government, in upholding detention of Japanese nationals and their descendants during World War II.

⁹⁵ 287 U.S. at 400-01. It has been suggested that *Sterling*, in effect, applied the *Milligan* principle to all law enforcement situations involving the military, including civil disturbances. See *Study, supra* note 40, at 428. It does seem that *Sterling* did, in fact, limit *Moyer* to its precise facts—a restriction that narrows the scope of its application to a Governor's arrest order issued

D. West Virginia Interpretation

West Virginia precedent in the area of martial law is unique and presents three instances where the West Virginia Supreme Court of Appeals reviewed and approved the use of punitive martial law.⁹⁷ A fourth, and later case, narrowed the breadth of the earlier decisions.⁹⁸

The first such case was *State ex rel. Mays v. Brown*,⁹⁹ which arose out of a protracted period of violence resulting from attempts at unionization by the coal miners. The Governor proclaimed that a "state of war" existed in the Cabin Creek district of Kanawha County and declared that territory to be under martial law.¹⁰⁰ Mays was one of a number of individuals arrested and tried by a military commission established pursuant to the Governor's declaration. He was convicted and sentenced to the state penitentiary. He challenged the legality of the Governor's action by filing a petition for writ of habeas corpus.¹⁰¹ The West Virginia court upheld the Governor's authority to declare

to quell an existing insurrection. *But see*, *Valdez v. Black*, 446 F.2d 1071 (10th Cir. 1971), *cert. denied*, 405 U.S. 963 (1972), citing *Moyer* for the principle that the good faith of a guardsman was a complete defense, *i.e.*, good faith effectively supplants probable cause. This decision has been criticized. *See* Waranoff, *supra* note 2, at 13-15.

⁹⁶ *See* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The Court held that the civil courts may not be suspended by the federal government's resort to martial law. This decision is significant because of the wide variance in judicial opinions regarding martial law. The majority opinion by Justice Black denied that martial law can be anything more than military aid to civil authorities. One concurring opinion, by Justice Murphy, would allow martial law in its classic sense, but only when the civil courts are unable to function. A second concurring opinion, by Chief Justice Stone, would require a showing of necessity for both the executive proclamation and actions taken under it. The dissenting opinion of Justice Burton with Justice Frankfurter concurring, held that martial law in the theatre of war could be instituted at the President's discretion and, therefore, would not be subject to judicial review.

Sterling has been followed in *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn. 1936); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn. 1934).

⁹⁷ *See* *Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914); *Ex parte* Jones, 71 W. Va. 567, 77 S.E. 1029 (1913); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912).

See also RANKIN, *supra* note 17, at 85-111. "In the history of the United States, martial law has never been used in so broad a scale, in so drastic a manner, nor upon such sweeping principles as in West Virginia in 1912-1913 during the Paint Creek trouble . . . it was absolute martial law with all its force." *Id.* at 85.

⁹⁸ *Ex parte* Lavinder, 88 W. Va. 713, 108 S.E. 428 (1921).

⁹⁹ 71 W. Va. 519, 77 S.E. 243 (1912).

¹⁰⁰ *Id.* at 520, 77 S.E. at 244.

¹⁰¹ *Id.* at 521, 77 S.E. at 244. Petitioner contended that the Governor lacked the authority to institute martial law, or, in the alternative, that his power to do so extended only to qualified martial law, subordinate to the civil jurisdiction. He further argued that the West Virginia constitution prohibited the writ of habeas corpus from being suspended and military forces from operating superior to civil institutions.

martial law as well as his power to declare the existence of a state of war.¹⁰² Moreover, the court reached this decision even though West Virginia constitutional provisions prohibit the suspension of the writ of habeas corpus and allow no exceptions for invasion and insurrection.¹⁰³ Other constitutional provisions provide that the military should always be subordinate to the civil power¹⁰⁴ and that no citizen should ever be tried or punished by any military court if the offense being tried was cognizable by the civil courts.¹⁰⁵ The theory espoused by the court was that the people could not have intended to forfeit the power of self-preservation by use of the military since such power is an incident of sovereignty.¹⁰⁶ Therefore, the constitutional limitations must be read in light of the state's right to preserve itself.¹⁰⁷ The remedy available to citizens, where the Governor has abused his power, is the impeachment process for removal of the executive.¹⁰⁸ The syllabus by the court states that executive acts are not reviewable by the courts "while the military occupation continues."¹⁰⁹ Furthermore, martial law could be properly and lawfully imposed even though the civil courts were open in Kanawha County.¹¹⁰ The court stretched the "good faith" standard of *Moyer* to its limits. Martial law in all its power could be established whenever the Governor deemed it necessary.¹¹¹ Judge Robinson, relying on principles laid down in *Milligan*,¹¹² disagreed

¹⁰² *Id.* at 522-27, 77 S.E. 244-47. This opinion has been described as "one of the most radical ever given by an American court concerning martial law." RANKIN, *supra* note 17, at 94.

¹⁰³ W. VA. CONST. art. III, §§ 4, 10.

¹⁰⁴ W. VA. CONST. art. III, § 12; *See also Governor's Emergency Powers*, *supra* note 2, at 294.

¹⁰⁵ W. VA. CONST. art. VII, § 12.

¹⁰⁶ 71 W. Va. 522, 77 S.E. 245.

The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of *habeas corpus* should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves.

Id. at 523, 77 S.E. at 245.

¹⁰⁷ *Id.* at 523, 77 S.E. at 245. "Nothing can be higher in character or more indispensable than this power of self-preservation." *Id.*

¹⁰⁸ *Id.* at 525, 77 S.E. at 246. "Any officer of the State may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The house of delegates has the sole power of impeachment." W. VA. CONST. art. IV, § 9.

¹⁰⁹ 71 W. Va. at 519, 77 S.E. at 244.

¹¹⁰ *Id.* at 525, 77 S.E. at 246. Thus the court disregarded *Milligan*, maintaining that, even though there were courts open, both inside and outside of the military zone, this fact did "not preclude the exercise of powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation . . ." *Id.*

¹¹¹ RANKIN, *supra* note 17, at 94.

¹¹² *State ex rel. Mays v. Brown*, 71 W. Va. 519, 543-44, 77 S.E. 243, 253 (1912) (dissenting opinion).

with the majority upon each important point.¹¹³ The real differences in the two views revolved around each side's idea of what constituted a state of war.¹¹⁴

Three months later in *Ex parte Jones*,¹¹⁵ the court held that the principles and conclusions of law announced in *State ex rel. Mays v. Brown*, having been reconsidered, after thorough argument and consideration, were approved and affirmed.¹¹⁶ Again, Judge Robinson dissented.¹¹⁷

The next year, the court again considered martial law and executive power in *Hatfield v. Graham*.¹¹⁸ The essence of that opinion is that so long as there is a disturbance in any part of the state justifying martial law, the Governor has discretionary power to extend martial law to any portion of the state to eliminate interference with its administration.¹¹⁹ So long as the Governor acts in good faith, his actions and his subordinates' actions are not reviewable by the civil courts.¹²⁰

Finally, in *Ex parte Lavinder*,¹²¹ the court narrowed the scope of

¹¹³ *Id.* at 527-51, 77 S.E. at 247-57. Judge Robinson stated that the court's decision "boldly asserts that the sacred guaranties of our State Constitution may be set aside and wholly disregarded on the plea of necessity." *Id.* at 527, 77 S.E. at 247. Furthermore, the dissent argued that

a declaration of war is not a declaration of martial law. The mere presence of war does not set aside constitutional rights and the ordinary course of the laws. Civil courts often proceed in the midst of war. . . . *Martial law rests not on constitutional, congressional, or legislative warrant; it rests on actual necessity. Nothing else can ever authorize it. And that necessity is reviewable by the courts.*

Id. at 535, 77 S.E. at 250 (emphasis added).

¹¹⁴ RANKIN, *supra* note 17, at 96-97. After Judge Robinson's dissent was read, the majority took the unusual step of filing a supplemental opinion. 71 W. Va. 551-67, 77 S.E. at 257-64.

¹¹⁵ 71 W. Va. 567, 77 S.E. 1029 (1913).

¹¹⁶ *Id.* The opinion included an extensive history of martial law with quotations that, in the court's opinion, substantiated its own interpretation. RANKIN, *supra* note 17, at 98.

¹¹⁷ 71 W. Va. at 609-25, 77 S.E. at 1047-1054 (dissenting opinion).

¹¹⁸ 73 W. Va. 759, 81 S.E. 533 (1914).

¹¹⁹ *Id.* at 765-66, 81 S.E. at 536. Since the government is divided into three separate branches, the court reasoned that "he [the Governor] must determine for himself the necessity for the exercise of such power as is vested in him. . . . Within his constitutional duties and powers he is supreme." *Id.* at 766, 81 S.E. at 536. Moreover, "[t]he necessity for the act is its justification, and the governor had the discretion to determine whether the necessity therefore existed" *Id.* at 767, 81 S.E. at 536.

¹²⁰ This is an extension of the decisions in *Brown* and *Jones*. The Governor's power to proclaim martial law is extended from a limited zone, to include all of the state. The court concluded that, "unless his belief is wholly unfounded, the legality of his act is unquestionable." *Id.* at 767, 81 S.E. at 536. Again, Judge Robinson dissented.

¹²¹ 88 W. Va. 713, 108 S.E. 428 (1921).

the Governor's powers. Instead of denying that the Governor could declare war, the court drew a line between "actual" and merely "theoretical" warfare. Until military forces were mobilized and employed, there could be no actual warfare and no martial law.¹²² "[T]he proclamation of war did not, *ipso facto*, nor *ex proprio vigore*, inaugurate martial law in Mingo County."¹²³ Thus, the unchecked discretion of the executive was more narrowly drawn.

IV. CONCLUSIONS

The development of martial law indicates that the bastard offspring familiar to Americans today is far removed from the initial concept. This does not mean that archaic principles of law should be rigidly maintained out of a mystical reverence for the past. It means, rather, individual liberties that have traditionally been protected by constitutional guarantees should not be discarded at the instance of expediency or necessity.¹²⁴ The states should be able to act to suppress domestic disorders, riots, and internal disturbances; however, any such action should be undertaken in accordance with traditional constitutional concepts that permit soldiers to be utilized as citizens augmenting the *posse comitatus* of the local authorities, and not as soldiers, immune from civilian law.¹²⁵ Clearly, the National Guard can be used to augment local law enforcement personnel, but it should be permitted to act only to the extent that the civilian law enforcers themselves are permitted to act. The National Guard should be used to preserve civil law and order, but it should be subject to liability according to the civil laws, as is any other citizen who is a part of the *posse*. Accordingly, the personal liability of individual members of the Guard should be ascertained by the civil courts instead of military tribunals.¹²⁶

The West Virginia Legislature should undertake to restrict the chief executive's discretionary authority to maintain law and order so that it remains within the limits set forth in the West Virginia constitution.¹²⁷ Statutory guidelines and definitions should be formulated to allow sufficient executive discretion to meet emergency situations while assuring the preservation of constitutional due process to all

¹²² *Id.* at 715, 108 S.E. at 430.

¹²³ *Id.* at 716, 108 S.E. at 429.

¹²⁴ *Study, supra* note 40. See also Engdahl, *supra* note 2.

¹²⁵ See note 63, *supra*. See also Waranoff, *supra* note 2.

¹²⁶ For a full discussion see note 66.

¹²⁷ W. VA. CONST. art. III, § 12; art. VII, § 5.

citizens.¹²⁸ Furthermore, the judiciary should be given explicit jurisdiction to review executive determinations.¹²⁹

The constitutional predicate for such legislative action is afforded by the Supreme Court's decision in *Milligan* with the subsequent development of the "incorporation doctrine" as the basis for applying selected provisions of the Bill of Rights to the states through the fourteenth amendment.¹³⁰ Since *Moyer* was decided before the court began to "incorporate" the Bill of Rights into the fourteenth amendment, it can be argued that *Moyer* has been overruled sub silentio. Furthermore, the court's subsequent decision in *Constantin* suggests that the *Milligan* principle should be applied to all law enforcement action by the military, including action taken during civil disorders.¹³¹

There are several considerations supporting such a conclusion. First, if the *Milligan* principle is applied to all law enforcement by military forces, to permit an exception for civil disorders is patently inconsistent.¹³² Second, there is scant reasoned justification for the conclusion reached by the *Moyer* court.¹³³ Third, it is difficult to justify protection of property rights in accordance with the requisites of due process in cases where an insurrection is declared, while not affording at least equal due process protection to individual liberties in such instances.¹³⁴ Finally, there is a contemporary predicate for such legislation because of the increased reliance on the insinuation of military force into civil disorder for the purpose of maintaining or restoring law and order.¹³⁵ "[T]he principle is well-established and recognized that military force should not be used against civilian populations except in the circumstances of extreme necessity, and then only in the degree and for such duration as may be necessary to restore order."¹³⁶

¹²⁸ *Study, supra* note 40, at 431-36. This article drafted the model: "A State Statute to Regulate the Use of State Militia in Civil Disturbances." It concludes a provision dealing with limitations on the power of the military when called by the Governor and a provision formulating guidelines for the proclamation of martial law.

¹²⁹ *Sterling v. Constantin*, 287 U.S. 378 (1932). The importance of such a provision is underlined by several recent federal decisions which hold that executive power to call out the military forces of the state to quell disorder may not be limited by court order establishing a prior restraint upon its use, and indicating by way of dicta, that such a decision is not reviewable at any time by the judiciary. These decisions rely on *Moyer*, but ignore *Milligan*. See *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972); *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971); *United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971).

¹³⁰ *Study, supra* note 40.

¹³¹ *Id.* at 428.

¹³² *Id.*

¹³³ *Id.* at 429.

¹³⁴ *Id.*

¹³⁵ See note 14, *supra*.

¹³⁶ CIVIL DISORDERS, *supra* note 1, at 156.

Legislative action consistent with these principles would retain, and reestablish ancient precepts of due process of law, essential to the preservation of individual liberties; it will also allow the Governor to take timely action to preserve domestic tranquility—within the historic confines of the Constitution.

James E. Roark